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IN THE

Supreme Court of the United States

October Term, 1952

No. 532

UNITED STATES OF AMERICA, *Appellant*

v.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, JOHN M. HANCOCK, ET AL.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR APPELLEE, THE KROGER COMPANY

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OPINION BELOW

The opinion of the District Court (R. 72-74) is not reported.

JURISDICTION

The judgments appealed from were entered by the District Court on August 29, 1952 (R. 75-7, 78-9, 81-2). On October 27, 1952 the petition for appeal was allowed (R. 94, 95). The jurisdiction of this Court to review the de-

cision of the District Court was invoked under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. Section 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989, 15 U.S.C. Section 29, 1946 Supp. Vol. IV, p. 601. On February 2nd, 1953 this Court noted probable jurisdiction (R. 104).

QUESTIONS PRESENTED

This brief is filed on behalf of The Kroger Company, a defendant in one of the three actions involved in this appeal. The facts in the three cases are substantially the same, so far as relevant to this appeal; and the questions presented and the arguments in this brief are generally applicable to the corporate defendants in the three cases.

The questions are:

1. Did the trial judge err in dismissing the action as against the corporate defendants where (a) the interlocking directorship had been terminated; (b) there is no claim that the particular relationship will ever be resumed; and (c) no facts or circumstances are alleged which suggest that the corporations have in the past or would in the future acquire or permit other interlocking directorships with competitors?

2. Does Section 8 of the Clayton Act make it illegal for a *corporation* to have on its Board of Directors a person who is a director of another corporation which is a competitor in the prescribed degree, or is Section 8 directed exclusively to the *individual* who serves on both Boards? If Section 8 is restricted to the individual directors, may the corporations nevertheless be joined as defendants for the purpose of securing general injunctive relief against them?

STATUTE INVOLVED

The material portions of the Clayton Act, 38 Stat. 730, as amended, provide as follows:

Section 8 (38 Stat. 732, as amended, 39 Stat. 121, 41 Stat. 626, 45 Stat. 253; 1536, 49 Stat. 717; 15 U.S.C. § 19):

> "... *no person at the same time shall be a director* in any two or more corporations, ... engaged in whole or in part in commerce, ... if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." (emphasis supplied)

Section 11 (38 Stat. 734, as amended 43 Stat. 939, 48 Stat. 1102, 52 Stat. 1028, 64 Stat. 1125; 15 U.S.C. § 21):

> "... authority to enforce compliance with sections two, three, seven and *eight* of this Act *by the persons respectively subject thereto* is hereby vested ... in the Federal Reserve Board where applicable to banks, ...; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:
>
> "Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that *any person is violating or has violated any* of the provisions of sections two, three, seven and *eight* of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing ... If upon such hearing [it] shall be of the opinion that any of the provisions of said sections have been or are being violated, it ... shall issue ... an order requiring *such person* to cease and desist from such violations, and divest itself of the stock ... held *or rid itself of the directors* chosen contrary to the provisions of sections seven and eight of this Act ..." (Emphasis supplied)

Section 15 (38 Stat. 736, 15 U.S.C. § 25):

"The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act . . ."

STATEMENT

The Kroger Company is a defendant in this action because John M. Hancock was a member of its Board of Directors while he was also a director of Jewel Tea Company. Hancock's directorship in Kroger was terminated within four weeks after Kroger first received any intimation that a question existed or had been raised as to its legality (Gov. Br., p. 8; Oyler Affidavit, R. 68-9). Both Hancock and Kroger have given assurances that the challenged relationship will not be resumed (R. 62, 70).

The Government does not question the good faith or reliability of these assurances. It does not suggest that Hancock might resume his directorship unless he and Kroger are enjoined. It urges, however, that this action should be entertained by the courts for the purpose of issuing injunctions which would (1) prevent Hancock from assuming "other illegal directorships in the future" (Gov. Br. p. 22);[1] and (2) forbid the corporations from the future acquisition, as a director, of any other person who is also a director of a "competitor corporation" (Gov. Br., p. 23; Complaint, R. 49).[2]

The Government does not charge, and has not charged, that Kroger has or has ever had an interlocking director other than Hancock. It does not assert any belief that Kroger will in the future attempt to violate Section 8, and it points to no circumstances which would indicate a tendency or proclivity to violation. Indeed, the Court will note

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[1] The Complaint requested other relief which the Government appears to have abandoned: e.g., that Hancock be required to terminate the challenged interlock by resigning from *both* directorships and not merely one. (R. 49).

[2] Although this brief deals specifically with the case involving Hancock, Kroger, and Jewel Tea Company, the position in the other two cases on this appeal is substantially the same.

that the factual argument in the Government's brief to support its contention that equitable relief is needed to prevent future violation is substantially barren of references to the corporate defendants (*Cf.* Gov. Br., pp. 14-16).

The facts show (1) that Kroger might reasonably have believed that Hancock's directorship was not illegal under Section 8 of the Clayton Act; (2) that it acted expeditiously to terminate the relationship after it first received advice from any source that the legality of Hancock's directorship was challenged; and (3) that there is no basis for expectation or apprehension that Kroger will ever knowingly permit a person to serve on its Board in violation of Section 8.

I

The Kroger Company operates approximately 1900 retail grocery stores in various states (R. 70). Hancock became a director in 1927. (R. 64) He had been a director of Jewel Tea Company since 1919 (R. 63). Jewel Tea Company is engaged in the sale of products by door-to-door solicitation in various parts of the country (Complt., R. 47). This "wagon-route" business of Jewel is different in nature and character from Kroger's store operations. Jewel augments its "wagon-routes" with retail stores only in the Chicago area where Kroger also operates stores. (Complt., R. 47). For these reasons, Kroger does not regard itself as in substantial competition with Jewel. (R. 69).[3]

On February 6, 1952, Kroger learned for the first time, as a result of a visit of an F.B.I. agent, that a question had been raised concerning the legality of Hancock's membership on Kroger's Board (R. 68-69). Hancock had known of this for some years, but he had not informed the company (Gov. Br., 7-8; R. 68-69).[4]

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[3] This appeal does not involve determination of the question whether the facts alleged constitute such competition between these two defendants as to bring them within Section 8 of the Clayton Act: i.e., whether "the elimination of competition by agreement between them would constitute a violation" of the antitrust laws. This question would have to be tried and determined if jurisdiction of the action were entertained.

[4] See the District Court's finding (R. 73).

Kroger acted immediately. Within 48 hours of the F.B.I. agent's visit, i.e., on February 8, 1952, Kroger held a meeting of its Board at which the directors resolved to request Hancock to withdraw immediately as a candidate for reelection to the Board at the forthcoming regularly scheduled stockholders' meeting of March 5, 1952 (R. 69). Kroger's President immediately advised Hancock of this action. On February 27—about a week before Hancock's withdrawal was to be effected—the complaint in this action was filed (R. 69).

At the March 5 stockholders meeting, Hancock's name was withdrawn as a nominee for reelection, and a full slate of directors, not including Hancock, was elected (R. 69-70).

By affidavit filed in this action and by notification to the Department of Justice, Hancock has affirmed that he has "no intention of ever going back on the Board of Directors of The Kroger Company so long as [he] remain[s] a director of Jewel Tea Company, Inc." (R. 62). Kroger has filed an affidavit stating that it "will not nominate or propose said Hancock for election as a director and to the full extent of its powers it will not suggest or encourage his selection." (R. 70).

II

As stated above, the Government does not suggest that Kroger has or has ever had a director, other than Hancock, who is also a director of a competing company.[5] Kroger's securities, as well as those of the other corporations involved in the three cases on appeal, are listed on the New York Stock Exchange. Changes in Board membership and the identities of directors and their affiliations must be disclosed to stockholders, to the Exchange, and to the Securities and Exchange Commission.[6] There is no possibility of

[5] Kroger's present Board is composed of 6 present or retired operating officials of the company, 4 directors engaged in other unrelated business in Cincinnati, 1 Cincinnati lawyer, 1 engaged in insurance business in Chicago and 1 Chicago management consultant. See Kroger's Annual Report and Proxy Statement, on file, S.E.C.

[6] 48 Stat. 792, 15 U.S.C. § 78 l(b) (1) (D); 17 C.F.R. §§ 240, 14a-3, Schedule 14A, Item 6; 249.210.

a future change in directors which would not immediately be known to the Government and the public.

III.

On these facts the defendants filed motions to dismiss supported by affidavits. The District Court (Conger, D.J.) treated the motions as motions for summary judgment (Rule 12(b), F.R.C.P.) and dismissed the action on the ground that the controversy was moot (R. 72-74). The facts relevant to decision were undisputed and the Government did not challenge the appropriateness of the summary judgment procedure. The court found that "there is (not) the slightest threat that the defendants will attempt any future activity in violation of Section 8 [if they have violated it already]" (R. 73). In characterizing the Government's insistence upon litigating the action despite termination of the alleged illegal relationship, the court said that the Government resists the motion to dismiss "principally, I assume, because the Government would like to have some law on the subject of which there is a sparsity" (R. 72).

IV

Although the directorship of Hancock in Kroger has been terminated and will never be resumed, Kroger has found it necessary to oppose the Government in this litigation not merely because of the merits of the legal position, but because of important practical considerations. These are:

1. It appears that the trial of this case will involve the burden and expense usually attendant upon anti-trust cases. The Government will undertake to establish that Kroger and Jewel Tea Company, Inc., are so related that "the elimination of competition by agreement between them would constitute a violation of any of the provisions of the anti-trust laws" (Clayton Act, §8, 15 U.S.C. §19). Kroger cannot concede this point because of the ambiguity of the standard, because the facts do not seem to warrant the con-

clusion, and because of the possible difficulties that this concession may cause in matters that may conceivably arise hereafter.

2. The Government has served upon Kroger a series of interrogatories to which Kroger must respond if the action goes to trial and it is a defendant therein. These interrogatories require detailed information as to each of Kroger's 1900 stores and its many warehouses; as to each of the more than 5000 items handled in each store; as to each of the hundreds of thousands of suppliers from which Kroger purchases each of these items; etc. (R. 56-59). Kroger conservatively estimates that response to these interrogatories will require the time of company employees for one year and will cost $250,000 (R. 70).

3. The Government seeks an injunction which is not confined to the specific situation claimed to be illegal, but which would prohibit Kroger, on penalty of contempt, from electing or having on its Board any directors who also were directors of "competing companies". Kroger has no intention of violating Section 8 or of approaching a violation; but the determination of when and in what circumstances corporations are in competition so that they may not lawfully have common directors is a difficult task which Kroger should not be required to undertake on penalty of contempt proceedings in the event of its erroneous decision or lack of knowledge of the facts. This difficulty is particularly formidable in view of the infinite variety of possible "competitors" resulting from the wide diversity of articles handled by Kroger's stores. These include not only groceries, but also certain wearing apparel, household equipment, books, cosmetics, toys and hardware items.

SUMMARY OF ARGUMENT

I. The lower court properly dismissed the actions as moot and inappropriate for the exercise of jurisdiction. The challenged interlocks had been dissolved, and the court

found on the facts that there was not "the slightest threat that the defendants will attempt any future activity in violation of Section 8 [if they have violated it already] . . ." (R. 73). Whether an injunction should be withheld when the challenged conduct has been discontinued is primarily a matter for the discretion of the trial court on the facts of each case. Dismissal is not precluded by the circumstance that the discontinuance followed the filing of the complaint. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419-421; *Hecht Co.* v. *Bowles*, 321 U. S. 321.

The record establishes that the trial court did not abuse its discretion and that this action does not present an appropriate occasion for the exercise of jurisdiction. The corporate defendants had no knowledge of the objection to their common directorships until shortly before the actions were filed (Gov. Br., p. 8). Immediately upon receipt of such information, and before suit was filed, steps were initiated by this appellee to eliminate the challenged relationship. The directorship in issue was terminated within four weeks after advice was first received that its legality was challenged (R. 69-70). The Government does not question the good faith or reliability of the assurances that the individual director, Hancock, will never resume the interlocking positions.

The sole purpose of this action as against the corporate defendants, is to enjoin possible future election of interlocking directors. The Government does not suggest that this appellee has ever had any interlocking director except Hancock or that there is the slightest danger or prospect that it will have such a director in the future. Accordingly, there is no need for relief and no basis for the exercise of jurisdiction.

II. There is no basis in the Clayton Act or otherwise for an equity suit against corporations to enjoin them from violations of Section 8. Section 8 by its terms applies only to individual interlocking directors. It does not apply to the corporations with which the individuals are connected.

Section 11 of the Clayton Act authorizing *administrative agencies* to issue orders against *a person violating Section 8* to compel "such person" to cease and desist and to "rid itself of the directors chosen contrary" thereto, does not by implication or otherwise authorize judicial proceedings against the interlocked corporations. The wording and history of the statute show that this language does not result in making it an illegal act on the part of corporations to have interlocking directors. At most, this language in Section 11 enlarges the enforcement machinery of the administrative agencies and commits the matter of remedies against corporations to their *exclusive* jurisdiction. It does not enlarge the "violations" specified in the Clayton Act which the courts are authorized to "prevent and restrain" under Section 15 thereof. In view of the wording, history and purpose of the statute, the court's "inherent equitable powers" do not authorize the exercise of jurisdiction over these corporations. This is particularly true since the Government seeks relief against the corporate defendants beyond the scope of the alleged violation by the individual director.

ARGUMENT

I.

The Trial Court Did Not Err in Dismissing the Action as Moot.

The legal criteria to be applied in this appeal are reasonably clear. They are: (1) The question of whether the controversy is appropriate for judicial determination is primarily one for the discretion of the trial judge under a few general rules. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 421. (2) The defendant must have discontinued the illegal practices (*U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290), and from the facts "it must appear that there is no reasonable expectation that the wrong will be repeated." (*U. S.* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (2d Cir. 1945).)

It is, of course, true, as the Government asserts, that mere discontinuance of the challenged action does not of itself render the case moot (Gov. Br., pp. 11-13). It is also true that the mere fact that discontinuance was not effected until after the complaint was filed does not preclude dismissal. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, *supra*. The controlling criterion is whether, on all of the facts of the particular case, there is or is not a *need* for equitable relief in order permanently to put an end to illegal conduct and to prevent its resumption in the same or a modified form.

This is the principle that emerges from analysis of the cases decided by this Court. This Court has rejected the defense of mootness where (1) the defendant has not in fact discontinued the practice at issue, or has continued the challenged practice in a different form; (2) the challenged violation was an elaborately devised plan to evade the law, giving rise to a reasonable expectation that the violation, perhaps in modified form, would be resumed; and (3) the challenged violation reflected a history of unlawful and intransigent conduct towards parties with whom the defendant was in a continuing relationship, such as labor unions, with the result that a resumption of unlawful conduct might be expected unless an injunction were issued.

The relevant cases relied upon by the Government in this appeal fall within these categories. In *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 307-310 (Gov. Br., pp. 9, 12), the defendants dissolved the challenged association, but immediately entered into a similar arrangement. In *Porter* v. *Lee*, 328 U. S. 246, 252 (Gov. Br., 13), the action obviously was not moot because the alleged violations of the Rent Control Act had not been terminated. The tenant had vacated the premises only as a result of a state court order which was at issue in the federal action before this Court (328 U. S. at 247-250). In *Local 74, United Brotherhood etc.* v. *NLRB*, 341 U. S. 707, 715 (Gov. Br., p. 13), mootness was claimed merely because

the particular project in which a secondary boycott had been employed against a retail store had been completed. The Court held that the basic controversy persisted because the union might repeat the practice on other projects. In *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 42-43 (Gov. Br., pp. 9, 12, 18-19) the defendant had adopted an elaborate and ingenious plan deliberately designed to circumvent the Fair Labor Standards Act, and the Court had reasonable grounds to anticipate that, unless enjoined, the defendant would indulge in other efforts to evade the law.

None of those cases is in point here. As the trial court found in the present case, the alleged violation has been terminated and there is not the slightest reason to anticipate violation in the future. The challenged action of the corporate defendant here concerns a single act. It is not in any way a part of a pattern of unlawful behaviour. It is in no way interwoven with a complex of relationships presenting a continuing opportunity and inducement to repeat the illegal conduct. The Government does not suggest any doubt of the complete reliability of the assurances in the record that the termination of the challenged conduct is final and irrevocable.

Accordingly, there is no vestige of a controversy which the courts may appropriately adjudicate. The purpose of the law has been served. There is no need for the exercise of jurisdiction or for judicial relief. See *U. S.* v. *Oregon State Medical Society*, 343 U. S. 326, 333-334; *Walling* v. *Nashville, C. & St. L. Ry.*, 330 U. S. 158; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 421; *Hecht Co.* v. *Bowles*, 321 U. S. 321; *Standard Oil Co.* v. *U. S.*, 283 U. S. 163, 181-182; *Industrial Association of San Francisco* v. *U. S.*, 268 U. S. 64, 84; *U. S.* v. *Alaska S. S. Co.*, 253 U. S. 113; *E. W. Bliss Co.* v. *U. S.*, 248 U. S. 37, 48.

The court below considered the facts which were undisputed, and concluded, on the basis of established principles, that the case was moot. It is of no importance that this decision was by way of summary judgment, rather

than after a full trial. The Government suggests no facts which might appear on trial and which could lead to a different conclusion with respect to the corporate defendant.

There can be no question that there was ample basis for the court's finding. Certainly, it did not abuse its discretion nor was its conclusion "clearly erroneous". The court had before it not merely the fact of the irrevocable termination of Hancock's directorship, but also the facts that Kroger, like corporate defendants in the companion cases, moved promptly to eliminate the challenged interlock; and that Kroger did not have knowledge of any claim that Hancock's directorship was in violation of the statute until a few weeks before these proceedings were instituted. It had taken steps to eliminate the challenged interlock before the action was brought. These facts are uncontested.

The Government does not charge that other similar offenses have been committed by the company. The action does not involve conduct which is insidious, pervasive or subtle. The termination of the challenged directorship completely eradicates the alleged offense, not merely a specific instance of it, or a symptom, but the total conduct. There is nothing further that need be done to achieve the purpose of the law.

It is of interest to note that the same result reached by the court below, in dismissing the present actions, has also been invariably reached in other Section 8 cases in which the challenged directorship has been terminated. Four recent cases brought by the Federal Trade Commission have been dismissed by four different Hearing Examiners where the alleged interlocking director has terminated his directorship.[7] In the only decided case in the courts under Section 8, in addition to those involved in this appeal, the

[7] *Whitin Machine Works, et al.*, Docket No. 6023 (Examiner Cox); *Vick Chemical Co., et al.*, Docket No. 6024 (Examiner Lipscomb); *Nesco, Inc., et al.*, Docket No. 6026 (Examiner Kolb); *Allis-Chalmers Mfg. Co., et al.*, Docket No. 6027 (Examiner Hier).

Appeals from the Examiners' decisions are now pending before the Commission.

district court dismissed the action as moot where the director resigned from one of the competing corporations before trial. *U. S.* v. *Mather*, Civil Action No. 5153 (N. D. Ohio, 1935).[8]

II.

District Courts Do Not Have Jurisdiction Over Corporations on Account of Interlocking Directors.

The court below did not reach appellees' claim that the Clayton Act does not authorize the suit against the corporate defendants (R. 67). But the question, of course, is jurisdictional and therefore may be properly considered by this court. See *United States* v. *Griffin*, 303 U. S. 226, 229; *Chicago, B. & Q. R. Co.* v. *Willard*, 220 U. S. 413, 419-20.

a. Section 8 does not cover interlocked corporations.

Section 8 of the Clayton Act clearly is restricted to a prohibition against the individual director. It does not forbid a corporation of the type involved in this appeal to have on its Board an interlocking director. This is clear beyond argument. Section 8 reads: "No person at the same time shall be a director in any two or more corporations . . ." It does not add that no corporation shall have such an interlocking director on its Board.

As originally enacted, Section 8 included specific language imposing corporate responsibility on the part of interlocked banks. The first two paragraphs of Section 8 in its original form provided in material part (38 Stat. 732-3):

". . . no person shall at the same time be a director or other officer or employee of more than one bank,

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[8] The language of Section 11 of the Act, which the Government claims relates to corporate defendants, clearly shows that Congress intended to reach only the specific interlocking situation at issue in a particular case. See *infra*, pp. 16-20. See also Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 Yale L. J. 1266, 1271 (1950), in which this Department of Justice official says:

"In Section 8 matters, the relief desired is simple and specific: resignation from all but one of the boards of the competing corporations."

banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits, aggregating more than $5,000,000 . . .

"*No bank, banking association or trust company,* . . . *shall have as a director* or other officer or employee any private banker or *any director* or other officer or employee *of any other bank*, banking association or trust company, located in the same place." (Emphasis supplied).

As to other types of corporations Section 8 in its original form referred, as now, only to the individual director.

The language quoted above, holding banking corporations responsible for an unlawful interlock, was eliminated by a 1935 amendment. 49 Stat. 717-18. The result of this amendment was to confine the prohibitions against interlocks in the banking field to the individual directors alone. This amendment placed banking and other corporations on the same basis so far as Section 8 is concerned. Liability for prohibited interlocks was imposed solely on the interlocking director, and not on the corporation.

Section 10 of the Clayton Act, both as originally enacted and as still in force, expressly deals with common carriers themselves in certain types of interlocking situations. This section provides (38 Stat. 734; 15 U. S. C. § 20):

". . . no common carrier . . . shall have any dealings . . . with another corporation . . . when the said common carrier shall have upon its board of directors . . . any person who is at the same time a director . . . of . . . such other corporation . . ."

See *In Re Missouri Pac. R. Co.*, 13 F. Supp. 888 (E. D. Mo., 1935).

In short, when Congress intended to apply sanctions against interlocked corporations, as distinguished from their common director, it knew how to say so. Section 8 never was and is not now directed to corporations of the type here involved.

The Government brought the present actions under the general provisions of Section 15 against the interlocked corporations as well as the individual director "to prevent and restrain the continuing violation by the defendants . . . of Section 8 of the Clayton Act". (Complt., par. 4, R. 46; R. 49; Gov. Br. p. 6). It does not agree that only a director can violate Section 8 (Gov. Br., p. 25) despite the unmistakable language of that section and the history to which we have referred. However, the Government argues that in any event the district court may entertain jurisdiction over the corporations and may direct an order against them of the broad type here requested, apparently by reason of certain language in Section 11 of the Act which defines the enforcement procedures and remedial powers of administrative agencies and the "inherent equitable powers" of the court (Gov. Br., pp. 25-26).

It is our position that Section 8, to enforce which these actions are brought (Complt., par. 1, R. 46), was not intended to and does not create a violation of law by interlocked corporations; that Section 11 does not authorize even an administrative agency to enter an order against such corporations; that even if Section 11 should be construed to authorize an administrative order against the corporations, it does not follow that the courts have power to exercise original jurisdiction over them under Section 15; and that the courts have no jurisdiction to entertain this action against interlocked corporations because the Congress did not, and did not intend to, enact a law which they could violate and certainly did not intend to make them subject to original proceedings in the district courts for violation of Section 8. This reasoning, we believe, disposes of these actions as against the corporate defendants whether the relief sought is ancillary to the relief prayed against violation of Section 8 by the individual defendant, or whether it is independent and beyond the scope of the individual defendant's violation. We point out, however, that the Government seeks the latter; that there is no issue in

this case as to the completeness of the relief that has been obtained with respect to the interrelations of the individual and these companies, either presently or for the future. See *supra*, pp. 11-12.

B. Section 11 does not authorize any proceedings before either an administrative agency or a court against a corporation for violations of Section 8.

Section 11 is a procedural section. It does not define or create offenses. It relates merely to procedure for dealing with offenses defined in other, substantive sections of the Act. The section provides (15 U. S. C. § 21):

> "*That authority to enforce compliance* with Sections two, three, seven and eight of this Act *by the persons respectively subject thereto* is hereby vested [in the designated agencies, including the Federal Trade Commission]" (Emphasis supplied)

This language, so far as it concerns Section 8, could not relate to authority to proceed against corporations, since they are not "subject to" Section 8. Ambiguity arises, however, from the subsequent authorization in Section 11 for an order to be issued directing that "such person . . . rid itself of the directors chosen contrary to the provisions of Section[ ] . . . eight . . ." "Such person" refers to any person violating Section 8.

The source of this language is apparent from the history of Section 8, to which we have already referred. As has been previously noted, the prohibitions of Section 8 in its original form did apply to one type of corporation—banks. Therefore, until the 1935 amendment, deleting the reference to the liability of banks themselves (as distinguished from their directors), the reference in Section 11 concerning divestment of directors was entirely consistent with the coverage of Section 8. Its purpose was to authorize the Federal Reserve Board to cause a bank to "rid itself" of offending directors. The 1935 amendment, however, deprived this provision of Sec-

tion 11 of any further function. However, no concurrent amendment was made to eliminate this language from Section 11.

We suggest that this vestigial language in Section 11 resulting from the failure to conform Section 11 to the 1935 amendment of Section 8 does not result in imposing liability upon corporations whose directors may be in violation of Section 8. The entire scheme and wording of the two sections repels this construction, as we have discussed. If Section 11 has this effect as to non-banking corporations, it also results in imposing liability upon "banks, banking associations, savings banks and trust companies", under Section 8, and not merely upon their directors. This would defeat the express purpose of the 1935 amendment, eliminating such liability.[9] Further, the construction urged would result in broadening the coverage of Section 8 beyond that which was clearly apparent prior to 1935. At that time, it was clear that Section 8 expressly extended to banking corporations, but not to non-banking companies. The construction now urged by the Government would accord an entirely unintended effect to the 1935 amendment, that is, to broaden Section 8 so as to make it applicable to non-banking corporations, exactly contrary to its purpose to eliminate any corporate liability.

c. If Section 11 is construed to authorize a proceeding against a corporation, it does not invest the district courts with jurisdiction.

If it should be deemed that the language in Section 11 relating to orders that a corporation "rid itself" of an interlocking director, has current meaning, it is limited to authority of the administrative agency—here, the Federal Trade Commission. At most, the quoted language vests remedial authority exclusively in the Federal Trade Commission to "issue . . . an order requiring [a] person [including a corporation] to . . . rid itself of the directors chosen contrary to the provisions of section[ ] . . . eight of this Act" (15 U. S. C. § 21).

[9] See H. Rep. 742, 74th Cong. 1st Sess., p. 24.

This language, however liberally construed, does not enlarge the list of violations of the Act which the district courts under Section 15 may "prevent and restrain". Section 11 is designed to implement the provisions of various substantive sections of the Act, including Section 8, by authorizing the Federal Trade Commission and other agencies to institute proceedings for their enforcement. It does not define or create offenses or augment the categories of violators prescribed by the substantive sections of the law. Correspondingly, it does not and cannot extend the jurisdiction of the courts to offenses or types of offenders not defined by the substantive sections such as Section 8.

This construction makes the provisions of Sections 8 and 11 consistent and intelligible, and it is in accord with actions previously taken by the Department of Justice, except for the present cases. In two of the three cases previously brought by the Department, only the individual directors were made defendants. *U. S.* v. *General Outdoor Advertising Company, et al.*, Equity No. 4650 (S. D. N. Y. 1928) and *United States* v. *Rand Kardex Bureau, et al.*, Equity No. 39 (S. D. N. Y. 1926). The complaint in the third, *U. S.* v. *Mather*, Civil Action No. 5153 (N. D. Ohio 1933) asked only that the corporate defendants be required to accept the resignations of the directors involved.

If Section 11 does have any independent force against corporations, it does not subject them to equity suits brought by the Department of Justice. The district courts and the Federal Trade Commission may, as the Government argues, have concurrent jurisdiction over *offenses* defined in the Clayton Act and the statute may provide for a "dual system of enforcement" (Gov. Br., p. 24). It does not follow, however, that if Congress, without enlarging the scope of the substantive offense has extended the coverage of the remedial powers of the agency, the jurisdiction of the courts is correspondingly enlarged. On the contrary, the reasonable and logical conclusion would be that Congress intended to commit the question of remedies against

corporations to the flexible, informal and less drastic processes of the administrative tribunal.

The Government's brief appears to suggest the possibility that authority to entertain this action against the corporate defendant may be found in the "inherent equitable powers" of the district court. Even if the complaints here sought relief against the corporate defendant only to implement the remedy against the individual director, it is our view that jurisdiction could not be entertained because the offense involved is entirely statutory; the statute shows a purpose to restrict the category of persons against whom it is operative; and the structure and history of the law show that it was not intended that the courts would exercise the asserted power. *Cf. Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616, 620 (8th Cir., 1942).

But the facts here are quite different. The Government is charging the corporations themselves with violations of Section 8 of the Act (Complt., pars. 14 and 15, R. 48). It asks that they be adjudged to have violated Section 8 of the Act and that a broad injunction be imposed far beyond the scope of any relationship with the individual director (Complt., Prayer, par. 5, R. 49). Certainly, the "inherent equitable powers" of a court do not extend to the creation of a statutory offense where Congress has not enacted it, and to treating as law violators, for the purpose of imposing broad and independent prohibitions, categories of persons who are not embraced within the scope of the law alleged to be violated.[10]

We submit, therefore, that if the Clayton Act is to be construed so as to authorize any remedy against corporations for interlocking directors, such remedy cannot be secured in an action in the district courts under Section 15, in which an adjudication is sought that the corporations

[10] The corporations involved in this action are not persons who must be joined pursuant to Rule 19(a) of the Federal Rules of Civil Procedure. *Cf. National Licorice Co.* v. *N.L.R.B.*, 309 U. S. 350, 362 *et seq.* Nor is there any basis on which to predicate the "right to relief" which is prerequisite to permissive joinder under Rule 20(a). *Cf. Gallagher* v. *Merritt Chapman & Scott Corporation*, 86 F. Supp. 10 (N. D. N. Y. 1949).

have violated Section 8 and broad and general injunctive relief is asked against any future "violations". Jurisdiction as to corporations, if it exists, is solely in the Federal Trade Commission.[11]

CONCLUSION

For the foregoing reasons the District Court did not abuse its discretion in declining to exercise jurisdiction and, in any event, the present actions are not authorized, insofar as relief is sought against the corporate appellees.

Respectfully submitted,

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[11] It is, of course, unnecessary in the present action to determine whether Section 11 vests the Federal Trade Commission and other administrative agencies with powers against corporations in case of violations by individual directors of the provisions of Secton 8. That question is now pending before the Federal Trade Commission. See fn. 6, *supra*.